

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-6 (Sub-No. 405X)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
—ABANDONMENT EXEMPTION—
IN JEFFERSON, GAGE, AND PAWNEE COUNTIES, NE

Decided: March 1, 2004

By petition filed on November 12, 2003, The Burlington Northern and Santa Fe Railway Company (BNSF), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a line of railroad extending between milepost 57.80, near Pawnee, and milepost 117.03, near Endicott, a distance of approximately 59.23 miles, in Jefferson, Gage, and Pawnee Counties, NE. Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register (68 FR 67508) on December 2, 2003. The exemption will be granted, subject to environmental and standard employee protective conditions.

BACKGROUND

BNSF reports that the line has experienced significant traffic and revenue declines during the past two decades. In 1980, BNSF's predecessor handled 1,785 cars on the line, compared to only 417 cars in 2002. In the first three quarters of 2003, BNSF handled only 337 cars over the line. In 2003, the line suffered severe damage and washouts as a result of excessive rainfall, and it has been out of service since June 2003. BNSF estimates that, at a minimum, it would cost \$135,000 to return the line to Federal Railroad Administration Class 1 operating condition. Because operation of the line is not profitable and the line requires substantial track maintenance and rehabilitation, petitioner seeks Board authorization for abandonment of this line.

According to BNSF, five shippers have used the line during the past three years — Southeast Nebraska Coop, Wymore Fertilizer, Farmers Coop, Firth Coop, and Endicott Clay Products (ECP). BNSF states that it has consulted with these shippers concerning the proposed abandonment. According to BNSF, all five shippers have adequate transportation alternatives that they are already using, and all five support the abandonment.¹ Although it suspended service over the line in June 2003,

¹ BNSF has submitted separate letters from each of the five affected shippers, in which the
(continued...)

BNSF reports that, with the cooperation of the Union Pacific Railroad Company (UP), ECP continues to receive rail service. BNSF states that, following the proposed abandonment, it will convey certain industrial trackage in the Endicott area to ECP, so that this shipper will enjoy a direct connection with UP and receive uninterrupted rail service.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of an abandonment application, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving BNSF of the costs of owning, restoring to service, and maintaining the line [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power. All five shippers on the line support the abandonment and have feasible transportation alternatives. Moreover, one of these shippers, ECP, will continue to receive rail service, albeit via UP. Nevertheless, to ensure that all of the shippers are informed of the Board's action, BNSF must serve a copy of this decision on the shippers within 5 days of the service date of this decision and certify to the Board that it has done so. Given the Board's market power finding, it need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979).

BNSF has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local government agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. The Board's

¹(...continued)
shippers state their support for the proposed abandonment.

Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on January 9, 2004, and requested comments.

In the EA, SEA set forth concerns raised by various agencies. First, the National Geodetic Survey (NGS) has identified two geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends a condition requiring BNSF to notify NGS at least 90 days prior to undertaking any salvage activity that might disturb or destroy these survey markers to allow NGS to plan for their relocation. Second, the Nebraska Game and Parks Commission (NGPC) has expressed concerns about the Rock Glen Wildlife Management Area, Rock Creek Station Historical Park, and Rock Creek State Recreation area, all of which are located near Endicott. NGPC advises that the Rock Glen/Rock Creek Station complex has 19th Century historical features and biological attributes that are adjacent to the line. In response to these concerns, SEA recommends a condition requiring BNSF to consult with NGPC prior to the commencement of any salvage activity. Third, BNSF states that diesel fuel contamination from locomotive fueling is likely to have occurred in Wymore, NE, where locomotive servicing activities once regularly took place. SEA reports that no environmental assessments have taken place at this location. Accordingly, SEA recommends a condition requiring BNSF to consult with the Nebraska Department of Environmental Quality, Waste Management Section (NDEQ-WMS), prior to undertaking any salvage activity in Wymore, to determine what clean-up measures may be required.

No comments to the EA were filed by the February 9, 2004 due date. Therefore, the conditions recommended by SEA will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA has indicated in its EA that the right-of-way may be appropriate for other public uses under 49 U.S.C. 10905. No one has sought a public use condition, and none will be imposed.²

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903 the abandonment of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979); and subject to the conditions that BNSF shall: (1) notify NGS at least 90 days prior to undertaking any salvage

² Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by December 22, 2003.

activity that may disturb or destroy the two geodetic station markers that are located along or adjacent to the subject line to plan for their relocation; (2) consult with NGPC prior to undertaking any salvage activity within the vicinity of the Rock Glen Wildlife Management Area, Rock Creek Station Historical Park, and Rock Creek State Recreation area; and (3) consult with NDEQ-WMS prior to undertaking any salvage activity in Wymore, NE, to determine what remedial measures may need to be taken to address possible diesel fuel contamination in the area.

2. BNSF is directed to serve a copy of this decision on the five shippers on the line within 5 days after the service date of this decision and certify to the Board that it has done so.

3. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by March 11, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a \$1,100 filing fee. See 49 CFR 1002.2(f)(25).

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

5. Provided no OFA has been received, this exemption will be effective on March 31, 2004. Petitions to stay must be filed by March 16, 2004; petitions to reopen must be filed by March 26, 2004.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF's filing of a notice of consummation by March 1, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary